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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

STAR TELEVISION, INC.; COMMUNITY BROADCASTING, INC.; CITIZENS TELEVISION CORP.; HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC.; and MAIN BROADCASTING CO., INC., *Petitioners*

v.

THE FEDERAL COMMUNICATIONS COMMISSION and FLOWER CITY TELEVISION CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners Star Television, Inc., Community Broadcasting, Inc., Citizens Television Corp., Heritage Radio and Television Broadcasting Co., Inc., and Main Broadcasting Co., Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinions of the Federal Communications Commission (App. A, *infra,* pp. 1-23) are reported at 9 F.C.C. 2d 249 and at 10 R. R. 2d 1059.[1] The opinions of the Federal Communications Commission on petitions for reconsideration (App. B, *infra,* pp. 24-30) are reported at 10 F.C.C. 2d 718 and at 11 R. R. 2d 771. The opinions of the court of appeals (App. C, *infra,* pp. 32-49) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra,* p. 50) was entered on January 30, 1969. The order of the court of appeals (App. D, *infra,* p. 51) denying petitioners' timely filed petitions for rehearing was entered April 1, 1969. By order of the Chief Justice entered on June 20, 1969, and by order of Mr. Justice Marshall entered on July 29, 1969, the time for filing a petition for a writ of certiorari was extended to and including August 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has, with respect to this as well as other comparative licensing proceedings, failed to comply with its statutory mandate by not developing a rational approach to comparative cases which it then applies and adheres to in particular cases; and specifically, whether the instant decision was arbitrary and not in accordance with the statute because of the Commission's unexplained failure to adhere to the policy standards

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[1] "App." refers to the Appendix to this petition. "R.R." refers to the volumes of Pike & Fischer Radio Regulation.

which the Commission had announced would apply to this proceeding.

2. Whether the Federal Communications Commission's decision in this case complied with the requirement of the Administrative Procedure Act, 5 U.S.C. 557(c), that all decisions shall include "the reasons or basis" for the agency's findings and conclusions.

STATUTES INVOLVED

Sections 307(a), 308(a) and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. 307(a), 308 and 309(a), provide in pertinent part:

> 307(a). The Commission, if public convenience, interest or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.
>
> 308(a). The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it * * *.
>
> (b). All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownerhip and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. * * *.
>
> 309(a). Subject to the provisions of this section, the Commission shall determine, in the case

of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

STATEMENT

1. Section 307(a) of the Communications Act of 1934 provides that the Federal Communications Commission "shall grant to any applicant therefor a station license provided for by this Act" if such grant will serve the "public convenience, interest or necessity." Section 308 of the Act provides for the grant of construction permits and station licenses and further provides that applications for such permits and licenses shall contain whatever facts concerning the character and financial, technical, and other qualifications of the application to operate a station as the Commission may prescribe. Section 309(a) of the Act reiterates that the Commission shall grant applications filed under Section 308 if it "shall find that the public interest, convenience, and necessity would be served * * *."

However, as this Court pointed out in *Nat. Broadcasting Co.* v. *United States,* 319 U.S. 190, 216-217, the statutory criterion of "public interest, convenience, and necessity" is not limited to the financial and technical qualifications of applicants for station permits and licenses, as such limitation would not enable the Commission to "choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate" a broadcast facility. Instead, as this Court went on to hold, "comparative con-

siderations as to the services to be rendered" govern the application of the "public interest, convenience or necessity" standard (319 U.S. at 217). The present case is of this nature, involving several financially and technically qualified applicants for a single broadcast facility, and the issues concern the manner in which the Commission has applied the governing criterion of "comparative considerations as to the services to be rendered."

2. In 1961, the Federal Communications Commission assigned a third VHF television channel, channel 13, to Rochester, New York,[2] and later the same year twelve applications for a construction permit for the new channel were filed, including the applications of the five petitioners herein and of the respondent Flower City Television Corporation (App. 33a). The applications were mutually exclusive, except for two which together proposed a share-time operation on channel 13 (App. 1, 33).[3] The Commission designated the applications for a consolidated comparative hearing, which began in June 1962 and ended in December 1962 (App. 37).[4]

In January 1964, the Commission's Hearing Examiner filed a 270 page initial decision, in which the

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[2] *Channel Assignment in Rochester, New York*, 21 R.R. 1748a.

[3] These were the applications of Rochester Area Educational Television (RAETA) and Rochester Telecasters, Inc. (RTI). Their proposal was that RAETA would use the channel part of each day as a non-commercial, educational station while RTI would use it during the remaining hours as a commercial station affiliated with the ABC Television Network. Each of the other applicants also proposed an ABC affiliation (App. 1-2, 37).

[4] Two of the original twelve candidates failed to press their applications at the hearing.

Examiner concluded that the share-time applications of RAETA and RTI for the construction permit should be granted because of the need for an educational broadcast service in the area (App. 1, 37).[5] The Examiner's decision recited the basic facts concerning each of the ten candidates which had pressed their applications for the channel, such as the residence, background and civic activities of the principals, the extent to which the stockholders of each would participate in station management, etc., and the Examiner found that each of these applicants was technically and financially qualified. The Examiner also made ultimate findings and conclusions comparing the successful share-time applicants (RAETA and RTI) with the other eight applicants as to various comparative criteria, denominated by the Examiner as: "area familiarity"; "integration of ownership and management"; "broadcast experience"; "diversification of control of mass media of communications"; "past performance records"; "preparation"; "programs"; and "other matters" (9 F.C.C. 2d 521-532). The Examiner, however, made no findings or conclusions comparing the eight unsuccessful contesting applicants with each other with respect to these criteria or comparing their qualifications in any other respects (App. 37; 9 F.C.C. 2d 521-532).

After the filing of exceptions to the Hearing Examiner's decision and oral argument before the Commission, the Commission in May 1965 remanded the proceeding for a further hearing so that more evidence could be adduced on certain questions (App. 2, 37-38). Before the second hearing was held, two events oc-

[5] The Hearing Examiner's decision is reported at 9 F.C.C. 2d 264-534.

curred. First, the Commission in July 1965 promulgated (with some dissent) a *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393, in which the Commission formally set forth the criteria which purportedly would govern comparative proceedings (App. 38). The criteria were divided into the seven categories called: Diversification and Control of Media of Mass Communications; Full-Time Participation in Station Operation by Owners; Proposed Program Service; Past Broadcast Record; Efficient Use of Frequency; Character; and Other Factors (App. 39; 1 F.C.C. 2d 394-399).[6] The Commission stated that the *Policy Statement* would be applied to pending cases (App. 3; 1 F.C.C. 2d 399-400).

The second event which occurred after the remand order in this case, was the voluntary withdrawal of the successful applicant RAETA (App. 3, 38). RAETA then applied for and is now operating a full-time UHF educational station in Rochester (App. 3, 38).

The Commission, stating that in view of the *Policy Statement* and the withdrawal of RAETA's application no useful purpose would be served by a second hearing, in April 1966 set aside its remand order (App.

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[6] These criteria had for the most part been previously enunciated by the Commission in deciding cases; and the *Policy Statement* was largely a formal restatement of old criteria. However, the *Policy Statement* did represent some revision of prior pronouncements. Under the *Policy Statement,* such factors as "previous broadcast experience" and "local residence" of owners, were deemed mere aspects of the criterion "Full-Time Participation in Station Operation by Owners," whereas prior to that time they had been regarded separately. In addition, the *Policy Statement* changed ostensible Commission policies as to the weight to be given certain criteria.

4). More than a year later further oral argument was held before the Commission, and in August 1967 the Commission rendered a 3-2 decision awarding the channel to the respondent Flower City Television Corporation (Flower) (App. 1-23).

In making its award, the Commission purported to apply its recently promulgated *Policy Statement.* With respect to the first comparative criteria listed in the *Policy Statement,* denominated "Diversification of Control of the Media of Mass Communications," the Commission found that only one applicant, The Federal Broadcasting System, Inc., should be given a disqualifying demerit because of its ownership and its 100 percent stockholder's ownership of other broadcast facilities in the Rochester area (App. 8-9).[7] The Commission in its opinion further stated that, apart from the "Diversification" factor, only two other important criteria were involved in this case, namely "Participation in Station Operation by Owners" and "Past Broadcast Record" (App. 13). As to the latter criterion, the Commission found that the only applicant entitled to a preference because of a past broadcast record was the petitioner Community Broadcasting, Inc. (App. 11).[8] This was because one of Com-

[7] Federal has filed a separate petition for a writ of certiorari, challenging the court of appeals' affirmance of the Commission's decision.

[8] The Commission in its *Policy Statement* defined "Past Broadcast Record" as "past ownership interests and significant participation in a broadcast station by one with an ownership interest in the applicant. It is a factor of substantial importance * * *." 1 F.C.C. 2d at 398. This factor should be distinguished from the phrase "broadcast experience" as used in the Commission's jargon. When the Commission regards an owner of an applicant as having "broadcast experience," it does not require that the past experience be also as an owner.

munity's owners, who would be active in a full-time supervisory capacity in Community's proposed station, had earlier been a fifty percent stockholder and general manager of a Rochester station which, during his tenure there, had a "commendable record of performance" (App. 11-12).

Turning to the remaining criterion which it deemed to be involved in this case, the Commission had earlier said in its *Policy Statement* that "Full-Time Participation in Station Operation by Owners" was a factor of "substantial" importance; that the Commission was "primarily interested in full-time" participation; that attributes of participating owners such as their experience and local residence will be considered but that prior experience is "not so significant as local residence" (1 F.C.C. 2d at 395-396). Despite these policy pronouncements that were purportedly applicable to this case, and despite the facts that Flower proposed less full-time participation by owners than four of the five petitioners, that Flower had a smaller percentage of local residency among its stockholders than a majority of petitioners, and that Flower had a smaller percentage of owners with prior broadcast experience than a majority of the petitioners, the Commission awarded the channel to Flower on the ground that Flower stood higher than any of the petitioners on the criterion of "Full-Time Participation in Station Operation by Owners" (App. 9-10, 13-14; see also 9 F.C.C. 2d at 266-355 for the Examiner's findings on these matters). The only reason given for the Commission's conclusion that Flower out-ranked petitioners on this ground, was the statement that "Flower ranks the highest, in view of the broad broadcasting, and particularly television experience of G. Bennett

Larson [a ten percent stockholder in Flower], and of the somewhat lesser broadcast experience of Gordon Auchincloss II [an 8.33 percent stockholder in Flower]" (App. 9-10). There were no findings whatever comparing the experience of these persons to the experience of petitioners' principals or explaining why such experience may have been better (App. 9-10). Moreover, as pointed out above, the Commission's *Policy Statement* had relegated previous broadcast experience to a secondary role under the criteria "Full-Time Participation in Station Operation by Owners" (1 F.C.C. 2d at 396), and one of the petitioners had been given a credit for a "commendable" past broadcast record (App. 11-12).

Finally, the Commission in this case not only designated an issue calling for a comparison of the various program proposals, but also inserted a special issue as to whether there are kinds of programming for which there is an "unfulfilled need" in the Rochester area and the extent to which each applicant "would meet such needs." (9 F.C.C. 2d at 265, paragraph 6(d)). The Commission in its decision stated that the withdrawal of RAETA's application rendered this issue "moot." (App. 4a).[9]

Two Commissioners dissented from the decision, with Commissioner Bartley stating that he would have awarded the channel to Federal (App. 19-21) and Commissioner Johnson expressing a preference for Community (App. 21-23). The basic thrust of Commissioner Johnson's dissent, however, was that the Com-

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[9] This occurred despite the fact that questions had been raised on the record concerning serious deficiencies in Flower's program planning. Admittedly, Flower had prepared its proposed program proposals prior to conducting any study, survey or investigation of community needs. RAETA's application obviously had nothing whatever to do with such deficiencies.

mission's present comparative hearing process "is a thoroughly unsatisfactory way to award valuable broadcast properties" and that "[n]o better example could be chosen to demonstrate this than the case which the Commission decides today" (App. 21). His dissent went on to refer to the "intolerable" delay accompanying the comparative process and the fact that "the extraordinary marathon conducted by the Commission and the applicants has produced no more satisfactory result than would a drawing from a hat" (App. 21-22).

After the Commission denied petitions for reconsideration (App. 24-30), a divided court of appeals in January 1969 affirmed the Commission's decision (App. 32-49). The majority decision, while acknowledging that the Commission's reasoning "may be a bit circuitous" (App. 34), nevertheless believed that its reading of the Hearing Examiner's basic findings respecting the broadcast experience of the various applicants' owner-managers showed the reason for the Commission's decision (App. 35). Judge Leventhal dissented on the ground that the Commission's findings and conclusions failed to reveal why it selected Flower (App. 37-49). The dissenting opinion pointed up the problem of the Commission's basic approach to comparative cases, raising the questions of whether the Commission can develop meaningful reasons for selecting one of several qualified applicants for a single facility, whether the Commission should rely on intuition, whether after narrowing down the field to the reasonably qualified applicants it should conduct "run-off" proceedings, or whether a lottery should be used (App. 47-48). Judge Leventhal concluded that where, as here, the Commission "purported to act in terms of reason," a reviewing court should be able to ascertain the reasoning (App. 48).

REASONS FOR GRANTING THE WRIT

The decisions below present three important and related matters of federal administrative law under the Communications Act of 1934, which have been recurring over the years, and which have not been, but should be, considered by this Court. The first of these is the Federal Communications Commission's failure to develop a rational approach to comparative licensing proceedings which it then applies to specific cases with some degree of consistency. This issue is highlighted by the instant case, for the Commission promulgated a "*Policy Statement*" for comparative cases during the pendency of this proceeding, purported to apply that *Policy Statement* to this case, but instead completely departed from the *Policy Statement* in its decision. This inability of the Commission to develop some consistently applied rationale in comparative broadcast proceedings has been dealt with by commentators over the years;[10] it is certainly a matter that is ripe for consideration by this Court. The second matter presented by this case is the total absence of satisfactory reasons given by the Commission for its decision. The plain language of the Administrative Procedure Act, as well as the decisions of the courts, require that the "reasons or basis" for an administrative agency's conclusions be given by the agency. However, as Judge Leventhal noted in his dissent below, "the Commission's reasons for preferring Flower are neither obvious nor 'discernible' * * *" (App. 43). The failure of

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[10] See, *e.g.*, Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 Harv. L. Rev. 1055 (1962); Levin, *Regulatory Efficiency, Reform and the FCC*, 50 Geo. L.J. 1 (1961); Landis, *Report on Regulatory Agencies to the President-Elect*; Schwartz, *Comparative Television and the Chancellor's Foot*, 47 Geo. L.J. 655 (1959).

the court of appeals to insist that the Commission articulate reasons for its decision negates the value of judicial review in comparative licensing cases. Of particular concern is the refusal of the Commission even to consider substantial evidence as to the "unfulfilled needs" of the Rochester area for particular kinds of programming, although it designated a special issue in the hearing calling for such an inquiry.

1. This Court has several times emphasized that the statutory standard of "public interest, convenience or necessity" which the FCC must use in determining which of several competing applicants should be awarded a license to use a single broadcast facility, is a broad standard. Congress did not prescribe more specific guidelines but vested in the Commission the duty and authority to develop a rational method for carrying out the statutory standard. *Nat. Broadcasting Co.* v. *United States*, 319 U.S. 190, 219; *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, ... U.S. ..., 37 L.W. 4509, 4513. Consequently, we assume for present purposes that the Commission could have chosen to utilize various bases in deciding which applicant should receive a particular broadcast license. Perhaps after narrowing a group of applicants to those technically and financially qualified to operate a facility, and who could be expected to operate it in the public interest, the Commission could select the winner by lot, or by intuition, or employ a bid system. Such possibilities were suggested by the dissenting opinions below and have been recommended by critics of the comparative process.

Neverthelss, the Commission has at no time expressly adopted any of the above-mentioned methods for resolving comparative cases. Instead, it has purported

to apply several specified criteria to the qualified applicants for a broadcast facility in order to determine which one is the best qualified to operate it in the public interest. The criteria, and the manner of applying them, are now embodied in the Commission's *Policy Statement*. However, as an examination of the decision in the instant case demonstrates, the Commission in fact appears to employ intuition or something other than the announced basis for selecting the licensee. The present decision is flatly inconsistent with the announced principles. Thus, the vice of the FCC's comparative process is not the Commission's failure to promulgate a presumably rational basis for deciding comparative cases; instead, the Commission's breach of its statutory duty stems from its failure to promulgate a rational basis for comparative cases which it in fact applies and adheres to in particular cases.[11]

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[11] Petitioners do not suggest that the Commission cannot periodically make changes in its declared policies, either by subsequent policy statements or in the course of the decisional process. However, petitioners do maintain that the Commission cannot, consistent with its statutory duty, change a particular policy while purporting to apply that policy and without giving any explanation for its inconsistency. The point was made by Judge Friendly who, after reviewing several FCC comparative cases in which the Commission changed its position with respect to certain criteria, went on to say:

> "What gives concern is the manner, alas not atypical of the agencies, in which this change was made—slipped into an opinion in such a way that only careful readers would even know what had happened, without articulation of reasons, and with the prior authorities not overruled, so that the opinion writers remain free to pull them out of the drawer whenever the agency wishes to reach a result supportable by the old rule but not the new."

Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 Harv. L. Rev. 1055, 1064 (1962).

The FCC's departure in this case from its *Policy Statement,* is manifest. For example, the second listed criterion in the *Policy Statement* (and the criterion which the Commission invoked as the ground for warding the channel to Flower) was "Full-Time Participation in Station Operation by Owners," 1 F.C.C. 2d at 395. Persons holding only 18.33 percent of Flower's stock intended to devote full-time to the station. However, with respect to the petitioners Main Broadcasting Co., Inc. (Main), Star Television, Inc. (Star), Community Broadcasting, Inc. (Community), and Citizens Television Corp. (Citizens), the percentages are, respectively, 50 percent, 37 percent, 29 percent and 23 percent (9 F.C.C. 2d at 252-253, 266-339). In the *Policy Statement* under this same "Participation" criterion, the Commission also indicated that (1) it would look to see if the participating owners had positions of responsibility in the station, (2) it would give preferential consideration to local residence of owners, and (3) it would consider the previous broadcast experience of owners, although "[p]revious broadcast experience [is] not so significant as local residence" (1 F.C.C. 2d at 395-396). With respect to the first factor, all of the petitioners as well as Flower contemplated high-level positions for the participating owners (9 F.C.C. 2d 266-339). As to local residency of participating owners, Flower was excelled by a majority of the petitioners regardless of whether only full-time participation or both full and part-time are looked to (*Ibid.*). Heritage, for example, with substantial part-time participation, exceeded Flower in resident ownership by community leaders. Regarding the previous broadcast experience of participating owners, the owner-managers of Flower owned 18.33 percent of its stock

whereas the owner-managers of petitioner Star held 37 percent, of petitioner Community 29 percent, and of petitioner Citizens 23 percent (*Ibid.*). It is also noteworthy that among the five petitioners and the respondent Flower, the only applicants with full-time owner-participants having a present residence or area familiarity with the Rochester area were petitioners Star, Citizens, Community and Main, and the only applicants with such owner-participants who had prior broadcast experience were petitioners Star, Citizens and Community (*Ibid.*).

It is obvious that in making the award to Flower on the ground of the owner-participation criterion, the FCC grossly departed from its *Policy Statement*. By relying on the bald conclusion that it preferred the experience of Flower's two participants owning only 18.33 percent of the stock (for some unexplained reason), the Commission ignored its previous announcement indicating that the primary aspect of the criteria is the degree of participation in the station by owners, and that, of the secondary aspects, previous experience is much less important than local residency (1 F.C.C. 2d at 395-396). The Commission also ignored the fact that among all applicants, the only one to receive a credit by the Commission for a commendable past broadcast record was one of the petitioners (App. 11-12).

In refusing to consider showings of the existence of "unfulfilled needs" for particular kinds of programs and the proposals of the applicants to fill those needs, the Commission went even further. This refusal is not only another example of the FCC's purporting to announce a particular policy or criterion applicable to comparative proceedings and then acting in total dis-

regard of that policy, but the Commission action is inconsistent with the "public interest" standard governing its actions, and, in this case, a violation of the due process requirement for a "fair hearing." It has long been settled that the proposed programming of competing applicants for a broadcast facility is an essential ingredient of any system to select the applicant best able to operate in the public interest. Just last term in *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* .... U.S. ...., 37 L.W. 4509, 4517, this Court stated: "In applying this standard [of public convenience, interest or necessity] the Commission for forty years has been choosing licensees based in part on their program proposals." See also *e.g., Henry* v. *F.C.C.,* 302 F. 2d 191 (C.A.D.C.), certiorari denied 371 U.S. 821; *Pinellas Broadcasting Co.* v. *Federal Communications Com'n,* 230 F. 2d 204 (C.A.D.C.), certiorari denied, 350 U.S. 1007; *Johnston Broadcasting Co.* v. *Federal Communications Com'n,* 175 F. 2d 351, 358-359 (C.A.D.C.). The courts have reversed the Commission in comparative cases because of the lack of findings upon the applicants' program proposals, *e.g., Plains Radio Broadcasting Co.* v. *Federal Communications Com'n,* 175 F. 2d 359, 362-363 (C.A.D.C.). In its *Policy Statement,* the third listed of the criteria was "Proposed Program Service," with the Commission saying that "decisional significance will be accorded" to substantial differences in the applicants' proposed program plans (1 F.C.C. 2d at 397). Moreover, the Commission has a policy of inquiring, in comparative hearings, whether there are presently any "unfulfilled needs" in the area to be served and the extent to which the applicants can meet such needs. *Rollins Broadcasting, Inc.,* 20 Pike and Fischer R.R. 976, 978 (F.C.C. 1960); *Integrated Communication Systems, Inc. of*

Massachusetts, 3 Pike and Fischer R.R. 2d 557 (F.C.C. 1964). Accordingly, in its designation of the applications in the present case for a comparative hearing, the FCC listed as two separate issues (1) "the programming service proposed in *each*" of the applications and (2) the programming service in each application considered in light of the types of programs for which there are unfulfilled needs in the area and the extent to which each applicant's proposals would meet such needs (9 F.C.C.2d at 265). The several applicants consequently devoted a considerable amount of time and effort at the hearing on the matter of programming, and the Hearing Examiner's basic findings relating to the programming issues take up one hundred and fifty-four pages of the initial decision (9 F.C.C. 2d at 354-508). Moreover, one or more of the petitioners had conducted comprehensive surveys of the programming needs of the Rochester area would be served, introduced evidence showing that there were certain "unfulfilled needs" for live discussion, news, educational, and other programs, and made detailed programming proposals which were geared to meet such needs, including a wide variety and large number of live discussion, news, and educational programs (9 F.C.C. 2d at 371).

In spite of the court decisions that programming is a vital ingredient of the "public interest" standard which the Commission is charged with effectuating, the *Policy Statement*, the effort of the applicants and the Hearing Examiner's findings on programming, the Commission in its decision stated somewhat incredibly that its designation of programming proposals among the issues was prompted by the presence of RAETA and that the withdrawal of RAETA's application ren-

dered the matter moot (App. 4, footnote 3). Nowhere previously, either in past decisions or in the *Policy Statement* or in the designation of issues for this case can any hint be found that proposed programming service is relevant only where one of the applicants proposes an educational broadcast facility.[12]

The inconsistencies between the Commission's *Policy Statement* and the decision in the case at bar could be dealt with in more detail. Nevertheless, the above-summary sufficiently reveals the Commission's propensity for purporting to apply certain policies to comparative cases while at the same time failing to adhere to those policies.

2. Closely related to the Commission's inability to develop a rational and consistently applied policy to comparative proceedings, is its utter failure to give reasons or explanations for particular decisions. The vice of departing from an announced policy is compounded when done without any satisfactory reasons being given. In this case, as emphasized by Judge Leventhal dissenting below, absolutely no reasons were given by the Commission for preferring the prior broadcast experience of Flower's owner-managers over that of petitioners' owner-managers. The reader of the Commission's opinion has no idea whether the Commission believed such experience to be quantitatively better, or whether it thought that such experience

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[12] In many cases acted on during the pendency of the instant case the Commission has included disqualifying programming issues and in some, it has disqualified applicants whose program planning was less deficient than was Flower's. *City of Camden*, 18 F.C.C. 2d 412 (1969); *Minshall Broadcasting Co.*, 11 F.C.C. 2d 796 (1968); *Vernon Broadcasting Co.*, 12 F.C.C. 2d 946 (1968).

was qualitively better, or if either, for what reasons. The Commission said only that the experience of Flower's owner-managers was "broad" (App. 10). But the experience of the owner-managers of several of the petitioners was similarly "broad". The Commission's opinion contains utterly no explanation of why Mr. Larson of Flower had any broader or superior broadcasting experience than Messrs. Greene and Hanna of Community or Messrs. Fay and Fraiberg of Citizens or Mr. Forman of Star.[13]

Moreover, even if the Commission had explained why Flower's principals had broader experience, it made no findings that Flower's principals were likely to be more sensitive to Rochester's needs and interests, or more likely to effectuate Flower's program proposals, or, in short, more likely to operate the station in the public interest to a greater extent than any other applicant. In addition, the Commission gave no satisfactory explanation for its disregard or de-emphasis of other factors as to which Flower was out-ranked by other applicants, such as programming proposals, local residence of owners, the percentage of ownership participating in station operation, past broadcast records, etc. While Congress gave the Commission a great deal of discretion, it did not, as noted by this Court in *Nat. Broadcasting Co.* v. *United States, supra,* 319 U.S. at 226, "authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis."

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[13] The very broad experience of Citizens' and Community's owner-managers is summarized by the dissent below (App. 40-41). The experience of the above-mentioned persons is set forth in more detail in 9 F.C.C. 2d at 285-286, 295-301, and 322-325.

When the Commission fails to delineate the basis for its choice, it is impossible for a reviewing court to determine whether some such capricious basis is being used or not, or whether the public interest is being served. Sound administration of the Communications Act of 1934, as well as the specific requirements of the Administrative Procedure Act,[14] dictate that the courts require the FCC to give reasons or explanations for its conclusions.[15]

3. The FCC's failure to develop a consistently applied policy for comparative cases, as well as it failure to give reasons for its action, have been recurring problems. For example, Judge Friendly, after reviewing several FCC decisions in comparative cases, observed: "Such inconsistency is intolerable." Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards,* 75 Harv. L. Rev. 1055, 1067 (1962). Professor Schwartz has pointed out that the Commission's inconsistency in comparative cases has "been so striking as to lead some to wonder whether Commission decisions have really been governed by any defined standards." Schwartz, *Comparative Television and the Chancellor's Foot,* 47 Geo. L. J. 655, 679 (1959). Similar criticisms of the Commission's inconsistency have been legion. Likewise, the absence of reasons or findings in Commission opinions have led to reversals by the courts. See, *e.g., Plains Radio Broadcasting Co.* v. *Federal Communications Com'n,* 175 F. 2d 359 (C.A.D.C.); *Radio Station KFH* v. *Federal Communications Com'n,* 247 F. 2d 570 (C.A.D.C.).

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[14] 5 U.S.C. 557(c).

[15] Absent rigid judicial insistence upon the Commission's articulation of clear reasons and explanations for its conclusions in adjudicatory cases, there is danger of recurrence of the "influence" scandals of the 1950's.

While this Court has previously commented upon the comparative process in broadcast cases, it has not specifically dealt with the matters directly presented by this case, namely the Commission's failure to consistently apply some rational standards and its failure to articulate reasons for its decisions. Furthermore, the criticisms by commentators and the reversals by the Court of Appeals for the District of Columbia Circuit have not corrected the FCC's failure to carry out properly its statutory mandate in these respects. The time is now ripe for the exercise of the Court's supervisory power, and this case is a particularly appropriate vehicle.[16]

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[16] In addition to presenting both important issues, the instant case is appropriate for review by this Court in another respect. The long delays accompanying the FCC's comparative decisional process have been called "intolerable" (App. 21, dissenting opinion of Commissioner Johnson below), and where there is a need for a broadcast facility, the public obviously suffers from such delay. However, in the present case, further delay will not affect the public interest because an interim corporation is broadcasting on channel 13 in Rochester, made up of competing applicants who are jointly managing the station (App. 49, footnote 24). As Judge Leventhal below observed, this particular interim arrangement is working well and "the effort is flourishing" (App. 49, footnote 4). Pursuant to orders of the court below, this interim operation will continue until the disposition of this case. Consequently, the public in this instance is being served despite the delay in selecting a licensee.

CONCLUSION

Because this case involves recurring questions of exceptional importance in relation to the criteria employed and the procedures utilized by the FCC in comparative hearings, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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